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Conclusion....

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States District Cour
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the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185 et seq.

QUESTIONS PRESENTED

1. In situations where the collective bargaining agreements provide for mandatory arbitration and include a no-strike clause, may a district court enjoin work stoppages prior to an arbitrator's determination of the arbitrability of the underlying dispute?

2. Will the reading that the Fourth Circuit places on Boys Markets[1] and Buffalo Forge[2] render meaningless the arbitration and no-strike clauses of collective bargaining agreements?

---

[1]Boys Markets, Inc. v. Retail Clerks Union, No. 770, 398 U.S. 235 (1970)

[2]Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976)

CASE

Hampton Roads

)[3], Cargill,

Terminal

(Rogers)[5] filed

District Court

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members and the aggression of the Soviet Union in Afghanistan, the district court found that:

> ...No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members or employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation. The Union cannot now rely upon its members' First Amendment freedoms, even if these freedoms extend to the challenged work stoppage, where there is no evidence that these actions represent the opinion of any substantial portion of the Union's membership.

Once the district court determined from the evidence that the underlying dispute between the parties was whether the union could, under the collective bargaining agreements, engage in a work stoppage to force management to refrain from dealing with a particular customer an issue that was clearly arbitrable, it next analyzed the contractual

the union:

, the defendants' entered into an o perform services. t of this agreement iction on the s ability to use a ge as a form of for its political re is nothing ional in requiring nts to fulfill actual obligations circumstances.

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A AGREEMENT)

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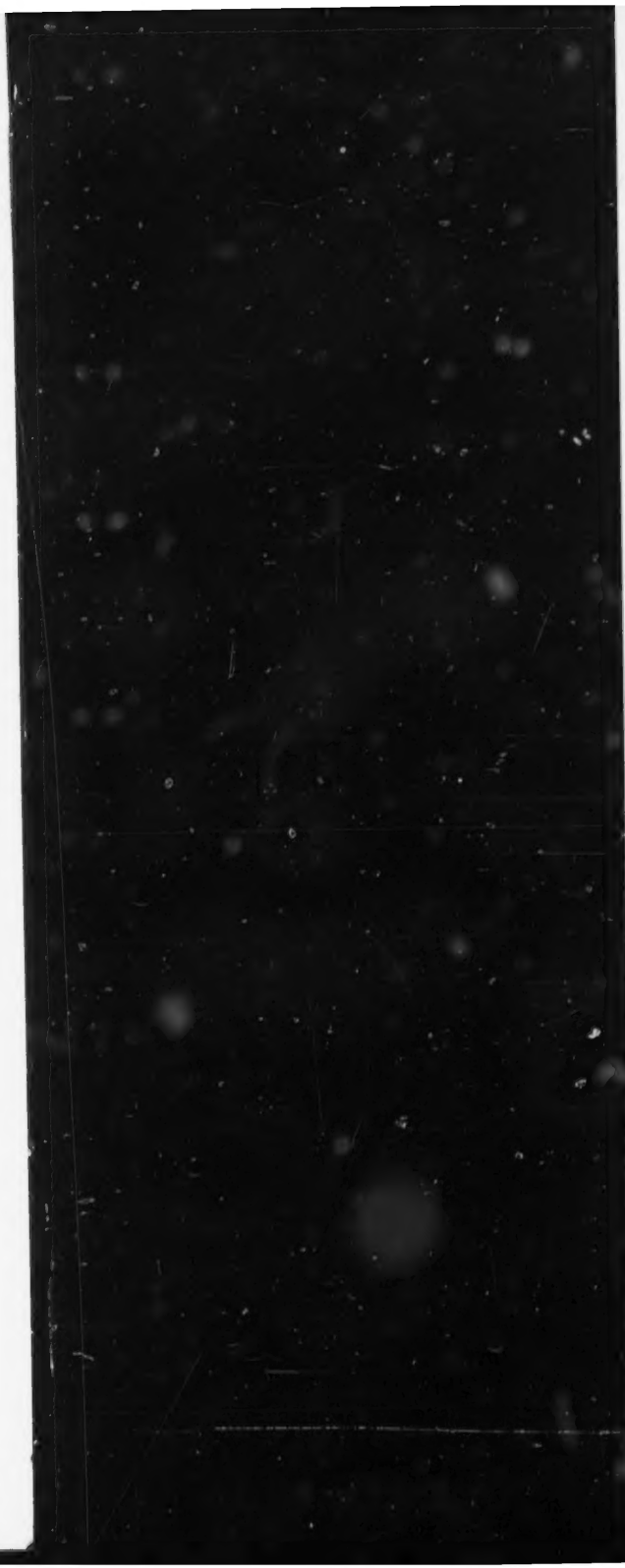

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U.S. at 253, n. 22. T
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withheld." Id. at 249

Respondents argue
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U.S. 397 (1976) held
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the decision reached by this Court in Buffalo Forge. However, that decision was distinguished rather easily by the district court in the instant case. In Buffalo Forge, the trial court was faced with a sympathy strike by one union on behalf of a sister union against the first union's employer. After hearing the evidence presented by the parties, the trial court found that the underlying dispute did not arise out of the contractual relations between the striking union and management. Rather, according to the evidence, the underlying dispute was between management and the sister union, not the striking union. Finding that an arbitrator could decide nothing concerning that issue, the district court disallowed injunctive relief on the question of the underlying dispute, holding that the issuance of an

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Id., at 407. Based on
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ISION OF THE UNITED STATES
F APPEALS FOR THE FOURTH
EFFECTIVELY PROHIBITS A
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sing the district court, the
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the Fourth Circuit effectively removes from the district court.

Buffalo Forge and Boys Markets read together will cause district courts to be faced with difficult determinations concerning the underlying disputes prompting work stoppages. By reason of those decisions, the district courts may safely conclude that a pre-arbitration injunction in a situation involving a sympathy strike is prohibited (Buffalo Forge) while a pre-arbitration injunction is perfectly proper when the union questions the authority of management to designate certain individuals to perform certain tasks (Boys Markets). In any factual situation between those extremes, such as the instant case, the district court must hear and evaluate the evidence and then determine whether the dispute is within the scope of the parties' contractual commitments. This

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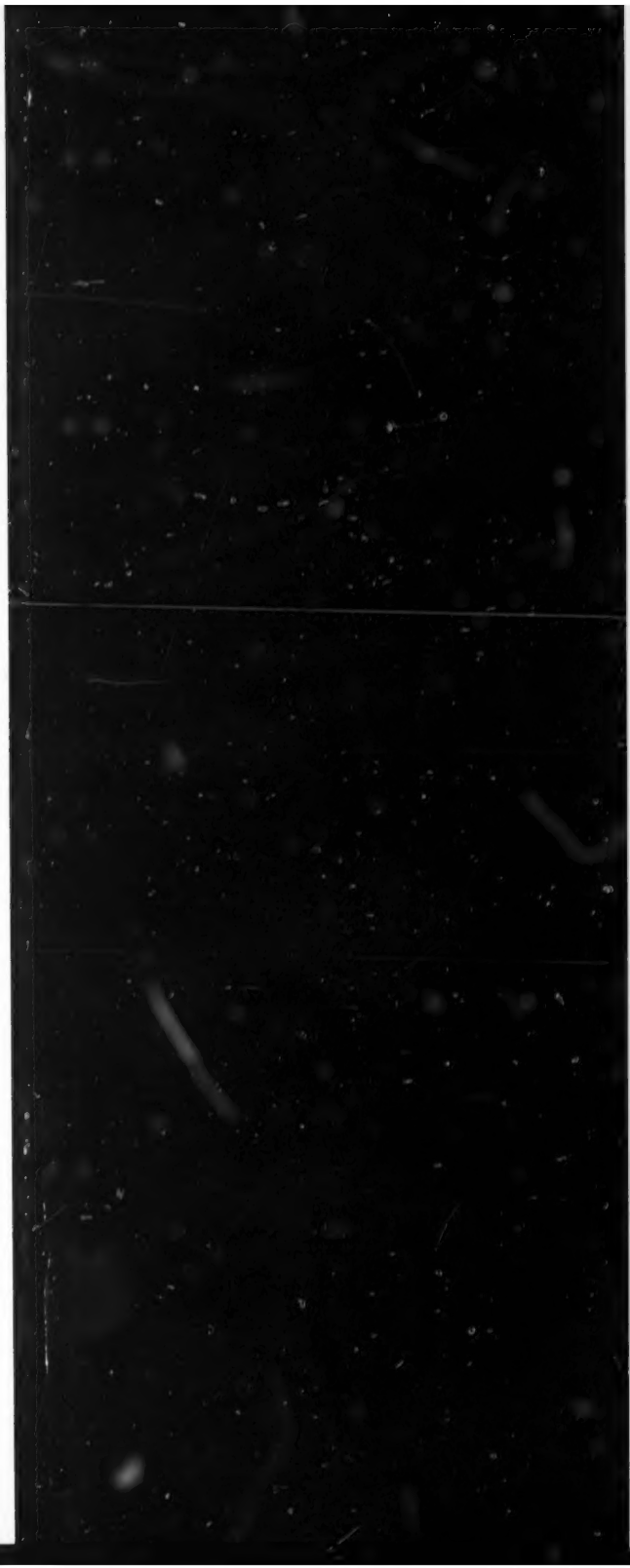

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The impact of the
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not the underlying dispute was arbitrable. In the highly volatile business of international trade, a work stoppage for even a few hours could result in irreparable harm to management during the period that the issue was being arbitrated. In many cases, the delay would render the arbitration process meaningless as the parties affected by the strike would have no choice but to consider alternative sources to satisfy their contractual commitments.

Boys Markets was decided to insure that the arbitration process would function as contemplated by the parties. The decision in Boys Markets affords equitable treatment to both parties to the agreement by insuring that the arbitration process has an opportunity to resolve disputes arising under the collective bargaining agreements. Buffalo Forge can not be read to remove

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Appendix

TATES DISTRICT COURT
DISTRICT OF VIRGINIA
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HIPPING ASSOCIATION

CIVIL ACTION
NO. 80-186-N

AND SHIPPING

Plaintiffs,

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Defendants.

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7. Cargill employs approximately eighty-four employees at its Chesapeake terminal facility. Local 1963 of the ILA is the exclusive bargaining agent for the production, maintenance, inspection, office, and clerical workers employed at this facility and is authorized to enter into agreements with Cargill on behalf of these employees.

8. On January 16, 1980, Cargill entered into a collective bargaining agreement with ILA Local 1963 covering the production and maintenance work and related activities at Cargill's Chesapeake grain elevator. This Agreement contains a mandatory grievance and arbitration procedure which governs all disputes between Cargill and Local 1963, which provides:

GRIEVANCES

1. A grievance is any controversy between the Company and

to any matter
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t no grievance shall
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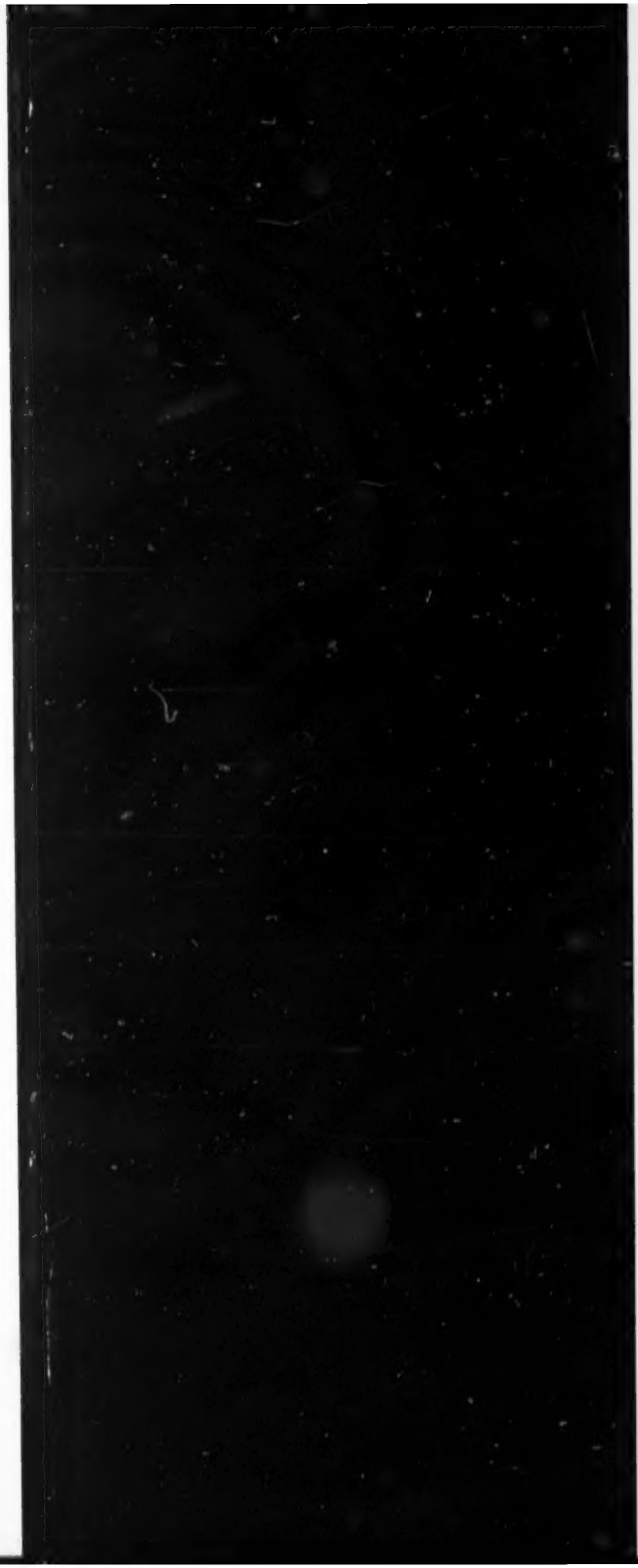

No grievance shall
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3. Arbitration sha
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this Agreement or a
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change any wage.

4. It is expressly
that any difference
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are not covered by
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make grievances ari
and during the term
Agreement subject t
arbitration.

5. The employees,
ally and collective
Union, agree that a
date of the signing
Agreement there are
unsettled claims or
grievances.

The Cargill-ILA

Agreement also contains

No-Strike clause:

ARTICLE XII

STRIKES AND LOCKOUTS

It is agreed that the union and its members, individually and collectively will not during the term of this Agreement, cause, permit, or take part in any strike, picketing, sit-down, stay-in, slow-down or other curtailment or restriction of production or interference with work in or about the Company's plant or premises so long as the Company abides by the terms of this Agreement. The Company reserves the right to discipline any employee taking part in any violation of this Article of this Agreement. Correlative with this provision, the Company agrees not to engage in a lockout so long as the Union abides by the terms of this Agreement.

9. On December 5, 1977, on behalf of its members, HRSA entered into a collective bargaining agreement with the ILA and its affiliated locals in the Port of Hampton Roads, which will expire on September 30, 1980. This agreement

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ECTION 37

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supportable. No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members or employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation. The Union cannot now rely upon its members' First Amendment freedoms, even if these freedoms extend to the challenged work stoppage, where there is no evidence that these actions represent the opinion of any substantial portion of the Union's membership.

Moreover, the defendants' voluntarily entered into an agreement to perform services. One incident of this agreement was a restriction on the membership's ability to use a work stoppage as a form of expression for its political views. There is nothing

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Roads Shipping Associat
Union.

2. The defendants,
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service any vessels carr
cargo to or from the So
any other way refusing t
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persons relating to vess
the Soviet Union.

3. Cargill, Incorpo
Terminal and Shipping Co
Hampton Roads Shipping A
the defendants shall pro
grievances over the lice

cargo to and from the Soviet Union in accordance with the contractual grievance procedure contained in Section 38 of the HRSA-ILA Agreement and Article XI of the Cargill-Local 1963 Agreement.

4. The plaintiffs shall continue to maintain a bond in the amount of One Hundred Dollars ($100.00) throughout the duration of this injunction.

5. This injunction shall continue until further Order of the Court.

_____
United States
District Judge

Nunc Pro Tunc
February 22, 1980
Norfolk, Virginia

APPEALS
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> labor dispute to prohibit any persons participating or interested in such dispute (as these terms are herein defined) from doing , whether singly or in concert any of the following acts:
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> (a) ceasing or refusing to perform any work or to remain in any relation of employment ... .[5]

Boys Markets created a narrow exception to the Norris-LaGuardia anti-injunction provisions and allowed federal district courts to issue injunctions against strikes when the union and company have entered into a collective bargaining arrangement containing a no-strike clause, thereby strengthening the arbitration process, stressed in the Steelworkers trilogy.[6]

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[5] 29 U.S.C. Sec. 104 (1973).

[6] United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Corp., 363 U.S. 593 (1960).

e refined the Boys Mar-
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discussed by Judge
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Workers of America.[7]
said:

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153, 1169 (4th Cir. 1977)
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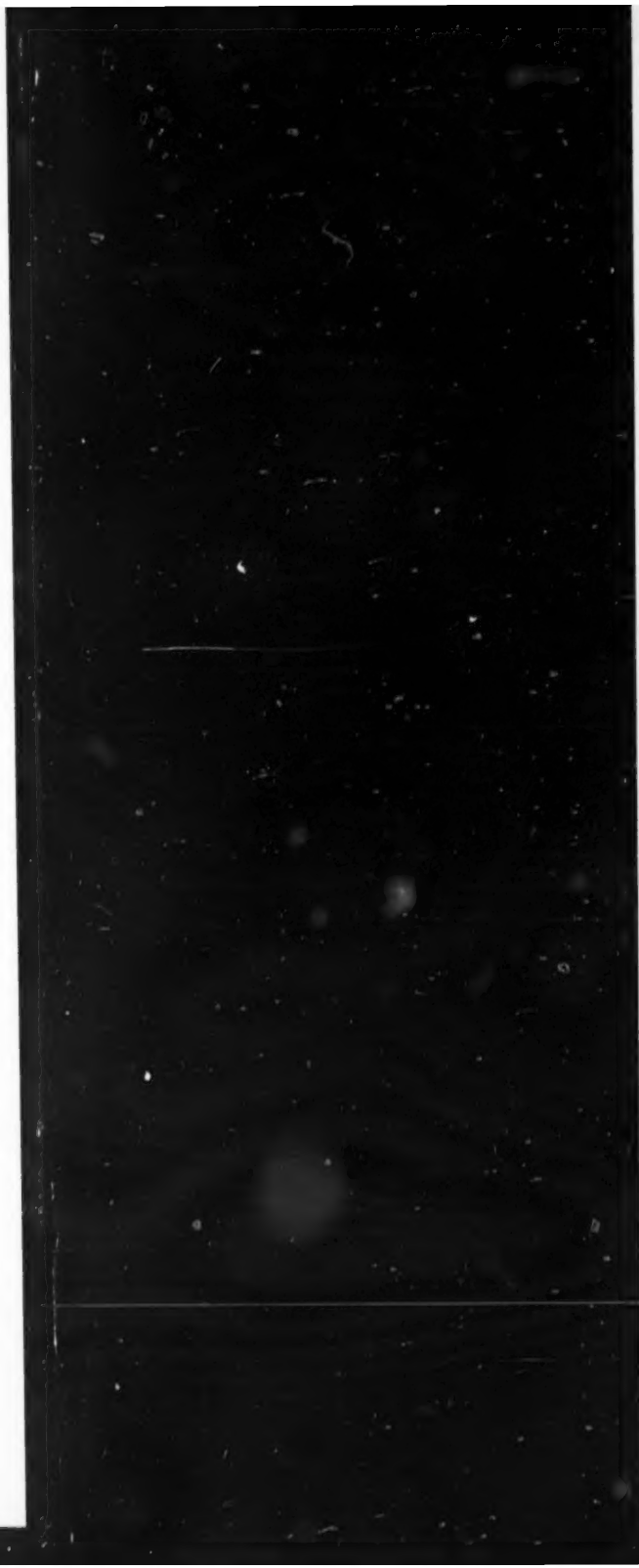

> But this would still
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The underlying cause

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[9] Id. at 412.

the collective bargaining agreement in order for a work stoppage to be enjoined pending arbitration, the trial court's issuance of an injunction based on its perception that the no-strike clause had been violated was clearly contrary to this holding and the holding of this Court in Cedar Coal.

In Buffalo Forge, the Supreme Court, in considering a complaint for an injunction to require Union members to cross the picket line of another Union (a classic sympathy strike), said:

> Nor was the injunction authorized solely because it was alleged that the sympathy strike called by the Union violated the express no-strike provision of the contracts.
>
> ...
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> ...Here the Union struck, and the parties were in dispute whether the sympathy strike violated the Union's no-strike undertaking. Concededly, that issue was arbitrable. It was

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REVERSED

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 1980, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid to each of the following:

Sidney H. Kelsey, Esquire
1408 Maritime Tower
Norfolk, Virginia 23510

Thomas W. Gleason, Esquire
One State Street Plaza
New York, New York 10004

I further certify that all parties required to be served have been served.

/s/ Guilford D. Ware

CRENSHAW, WARE & JOHNSON
1640 Virginia National Bank Building
Norfolk, Virginia 23510

Counsel for Petitioners

John W. McGrath Corporation v
trict, ILA, 80-CV-150 (N.D.N

Latrobe Steel Co. v. *United Steel*
AFL-CIO, 545 F.2d 1336 (3r

New Orleans Steamship Asso
Longshoreworkers ILA, 626
1980) .....

NLRB v. *Keller-Crescent Co.*, 53
1976) .....

United States Steel Corp. v. *Un*
America, 548 F.2d 67 (3rd C

United Steelworkers of America
facturing Corp., 363 U.S. 5

Statutes

29 U.S.C. § ~~101~~ 104 .....

Docket No. 80-1058

IN THE

eme Court of the United States

OCTOBER TERM, 1980

?TON ROADS SHIPPING ASSOCIATION, et al.,

and

RGILL, INC. and ROGERS TERMINAL AND SHIPPING CORPORATION,

Petitioners,

v.

ATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,

and

ILA LOCAL 1248, et al.,

and

ILA LOCAL 1963, et al.,

Respondents.

ION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

F FOR RESPONDENTS IN OPPOSITION

ndents International Longshoremen's Association, O ("ILA") and its affiliated locals and officers re- y request that the Court deny the Petition for a Certiorari seeking review of the Fourth Circuit's in this case. The opinion below is reported at 282 (4th Cir. 1980) and is reproduced at Petition, *eq.*

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January 9, 1980 ILA
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On appeal, the Court of Apeals for the F
reversed and vacated the preliminary inju
authority of *Buffalo Forge Co.* v. *United St*
America, AFL-CIO, 428 U.S. 397 (1976)
"*Buffalo Forge*"). Petitioners now seek a wri
from this Court to review the Fourth Circui

ARGUMENT

1. This Case Does Not Present Any Issue Review by the Supreme Court

As demonstrated below, the decision for wh
sought is no more than a straightforward
difficult application of the principle establish
Forge, supra. The interpretation of the *B*
decision by the Fourth Circuit is neither
novel. The Third, Fifth, and Seventh Circ
pressed a similar understanding of that ca
Steel Co. v. *United Steelworkers of Americ*
545 F.2d 1336, 1341 (3d Cir. 1976); *United*
Corp. v. *United Mineworkers of America*, 54
(3d Cir. 1976); *Jacksonville Maritime Assoc*
International Longshoremen's Association, A
F.2d 319, 325 (5th Cir. 1978); *NLRB* v. *K*
Co., 538 F.2d 1291, 1295 (7th Cir. 1976). Th
first time that the Fourth Circuit has interp
Forge in this manner. *See Cedar Coal C*
Mineworkers of America, 560 F.2d 1154, 11
1977).

That the application of *Buffalo Forge* to th
this case was not unusual is witnessed by th
still another circuit with respect to the same
involved here. In *New Orleans Steamship A*
General Longshoreworkers ILA, 626 F.2d 4
1980), the Fifth Circuit, on the strength of *B*
reversed a pre-arbitration injunction issued

court in Jacksonville, Florida to restrain the ILA's refusal to handle Russian cargo there.* Like the decision for which review is sought here, the Fifth Circuit held that, since the underlying dispute is between the ILA and the USSR and thus is not subject to arbitration, no injunction may issue prior to an arbitrator's ruling as to the arbitrability of the resulting question of whether the ILA's response to the non-arbitrable dispute violates the no-strike clause. *Id.*, 626 F.2d at 467.

The District Court for the Northern District of New York applied an identical understanding of *Buffalo Forge* to still another case arising out of the ILA action. *John W. McGrath Corporation* v. *Atlantic Coast District ILA*, 80-CV-150 (N.D.N.Y.). The court's unreported opinion is reproduced in the appendix to this brief.

Thus, there is no conflict among the circuits as to the law. There is no confusion or uncertainty about the meaning of this Court's prior decisions. The two circuits which have addressed the factual situation of this very case are in perfect accord.

Indeed, it would seem that petitioners do not claim that the Fourth Circuit is in error as to the law, merely that it misapplied the law to the facts of this case. Petitioners recognize that

> in the Fourth Circuit's view, the underlying cause of the work stoppage was the Union's disagreement with the Soviet Union over its actions in Afghanistan. Once the appellate court reached that conclusion, it would follow that such a dispute was outside the scope of the contract, and could not be resolved by an arbitrator. (Petition, 23)

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* A petition for a writ of certiorari to the Fifth Circuit is presently pending. No. 80-1045.

They claim merely that the Fourth Circuit's characterization of the underlying dispute disregards the evidence. As shown below, petitioners' claim is without merit. Even if petitioners' claim had some basis in fact, it would provide no ground for review by this Court. That a circuit has made an isolated error of fact by misreading the evidence is hardly of such significance that it calls for Supreme Court correction.*

Petitioners' misgivings that the Fourth Circuit's decision will lead to confusion in the district courts and chaos in labor-management relations are without foundation. The wisdom and efficacy of the holding in *Buffalo Forge* is borne out by the fact that, with respect to the ILA/USSR dispute, the issue of violation of no-strike clauses has been submitted to arbitration without prior interference by the courts in as many instances as pre-arbitration injunctions have been sought. In each instance the arbitrator found a violation of the particular no-strike clause and ordered the Union back to work. *See*, e.g., *New Orleans Shipping Association* v. *ILA*, *supra*, 626 F.2d at 460.

Finally, the argument that the policy favoring arbitration of labor disputes has been jeopardized is not well taken. On the contrary, this Court has repeatedly recognized that the no-strike clause is the *quid pro quo* for an agreement to arbitrate. *Boys Markets*, *supra*, 398 U.S. at 248; *Buffalo Forge*, *supra*, 428 U.S. at 407, 419; *United Steelworkers of America* v. *American Manufacturing Corp.*, 363 U.S. 564, 567 (1960). It follows that to enforce a no-strike clause where, as here, the underlying issue cannot be resolved by arbitration is to deprive a union of

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* The fact that the ILA refusal to service the Soviets applies to all ports in the eastern United States does not elevate the issues in this case to national importance. In the year it has been in effect, it has given rise to the granting of only two employer-sought injunctions (Hampton Roads and Jacksonville), and the denial of one (Albany, New York).

both its economic and contractual methods of resol disputes. Any approach other than that of the Fo Circuit and of *Buffalo Forge* can only deter unions f agreeing to broadly worded arbitration/no-strike clau with the inevitable result of practically undermining policy favoring arbitration.

2. The Fourth Circuit Correctly Applied the Doct of *Buffalo Forge*

The Fourth Circuit found that the ILA's primary pute is with the Soviet Union over the invasion Afghanistan.* It correctly held that this dispute does fall within the arbitration clauses of the collective berg ing agreements here, since it "cannot be resolved by arbitrator." 631 F.2d at 285. The court then corre held that, since the underlying dispute was not arbitra an injunction could not issue under the exception to No LaGuardia § 301[4] enunciated by this Court in *I Markets, supra.*

The Court further recognized that under the decisio *Buffalo Forge, supra,* the union's striking over the arbitrable dispute generated a second dispute as to whe such action violated the express no-strike clauses of collective bargaining agreements. Whether the second pute was arbitrable involved a matter of construing

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* Eight other United States Courts which have passe various aspects of the ILA action are in unanimous agreeme to the nature and participants of the underlying dis Describing the same dispute, the Fifth Circuit has said:

> The ILA's dispute is exclusively with the Soviet govern which is the only authority capable of responding t protest. *Baldovin* v. *International Longshoremen's As tion, AFL-CIO*, 626 F.2d 445, at 449 (5th Cir. 1980). *also, John W. McGrath Corporation* v. *Atlantic Coast trict, ILA*, 80-CV-150 (N.D.N.Y.) at Appendix A7.

contract and so was itself a matter to be decided by t arbitrator. Following the express direction of this Cou in *Buffalo Forge, supra,* 428 U.S. at 410, the Fourth C cuit held that no injunction could issue prior to a decisi by the arbitrator. 631 F.2d at 286. The circuit cou recognized that the district court's finding of a violati of the no-strike clause usurped the function of the ar trator and that the issuance of an injunction prior completion of arbitration was legal error.*

On the present application, petitioners would distort tl rather uncomplicated application of the holding of *Buff Forge* by urging a series of purported distinctions. Ev if well taken, petitioners' arguments would hardly prese the kind of issues that warrant review by this Cou Moreover, the arguments themselves are untenable.

Petitioners urge that the district court, after consid ing the opinion in *Buffalo Forge,* made a finding of fa based on the evidence that the primary dispute in this ca was between the unions and the employers and so subj to arbitration and susceptible of a traditional *Boys Ma ket* injunction. The district court's opinion does not su port such a reading. The determinative finding of t district court is set forth in paragraph 14:

> The Union's action in ordering its members to refu to work Soviet vessels or vessels engaged to car grain bound for the Soviet Union calling at the Port Hampton Roads is in violation of the no-strike pro sions of its agreements with HRSA and Carg (Petition A18)

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* In its order the Fourth Circuit directed that the issue violation of the no-strike clause be submitted to arbitration. T arbitration was held on December 19, 1980. No decision h been rendered as yet.

In the entire opinion there is no mentio
Forge. There is no finding that the union
to arbitrate a dispute which was capable of
Indeed, there is not, as petitioners would
analysis of the primary dispute or any findi
between the parties to the collective bargaining

Likewise, the claim that the district cou
(nonappearing) evaluation of the underlying
some evidentiary finding, as to which the ap
later usurped its function, simply finds no su
record. On the contrary, it is quite appar
district court, like every other court, was we
the primary dispute here is between the U
Soviet Union over the latter's military policy.
makes repeated reference, in paragraphs 10, 1
16, to the "foreign policy" aspects of the di
disregard of the Russian dimension would
myopia.

The "evidentiary" hearing to which peti
was nothing more than the introduction of
bargaining agreements and the Gleason staten
with testimony to establish a refusal to handl
Roads and evidence as to damages. Neith
tempted to introduce evidence with respect to
the work stoppage because it was self-evi

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* The ILA has consistently disclaimed any in
upon the making of foreign policy. President C
prohibits certain trade. It does not mandate a
Each individual and group is still free in the pr
act according to his own lights in determining w
participate in the still permissible commerce. T
of Russian caviar is still permitted. No one is th
to eat caviar. Moreover, the ILA action is self-
no more than a refusal in conscience by longs
selves to service the aggressors. No attempt has
persuade others to do likewise.

disputed.* In fact, what petitioners seek and district court may have done *sub silentio* and Fourth Circuit rejected was to *arbitrarily chara* dispute as being between the union and manage effort to avoid the plain dictates of *Buffalo For*

Petitioners seek to capitalize on the circuit co ment to the effect that the district court's dec based primarily on a 'management clause' in th bargaining agreement." 631 F.2d at 284, and this factor distinguishes this case from *Buff* The argument is without support.

With all deference to the Fourth Circuit, it incorrect to say that the district court relied o agement clause. It's opinion neither recites no a management clause. On the contrary, the di held in paragraph 14 of its opinion that the unic violated the *no-strike* clause. True, the lowe incorporate its remarks from the bench, whe discussed the management clause, but this wa graph 18 of the opinion which refers to the of the four crietria for equitable relief, not to t on the merits.

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* Petitioners' allusions to the district court's con respondents had not established by evidence that the was the will of the membership is totally irrelevant was raised by the court *sua sponte* in another context, an injunction would violate First Amendment rights. finding was based not on evidence but on uninform by counsel. The only evidence at all on this matter is statement which asserts that the union's action was the membership. Evidence in other proceedings est the ILA's action was prompted by and in confirm sentiment of its members. For whatever it is worth, court's finding is irrelevant to the nature of the un pute. On the question of arbitrability, it matters the dispute is between the union and the Soviets or b vidual longshoremen and the Soviets. Neither dispu resolveable by arbitration.

Any reliance on the management cl
able. Only the Cargill agreement, w
Local 1643 non-longshore employees,
ment clause. The HRS Agreement
the district court had relied on "ma
injunction could have applied only to
not to members of Local 1248.* The c
have relied on the management clause
junction it did, which was directed
and prohibited the work stoppage ag
HRSA (Petition A22, A23).

Nor can a characterization of the
attempt to invade management's right
The ILA's concern in this matter is
cipation in the Soviet enterprise. W
do, longshoremen wish not to service
selves. They have made no attempt
of other unions, businesses, or the pu
not punish anyone whose conscience
does not refuse to handle the non-S
companies who are notorious for tr
sians. It does not withhold services
continue to carry Russian goods, as l
do not have to handle them. It do
prisals against those employers who
action by diverting vessels to foreig
where the refusal to handle has b
Baldovin v. *International Longsho*
AFL-CIO, supra, 626 F.2d at 452.)
this as a dispute between the union
over management's rights would be

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* Such an injunction would, in practic
since the grain, after handling by Cargill
be handled by longshoremen to be loade
latter were not enjoined, Cargill's grain sti

Moreover, as the Fourth Circuit rea
reliance on a management clause would
calculated effort to avoid the holding
Management rights are being violated, i
work stoppage and it is only the work st
sought to enjoin. Thus, it is really
no-strike clause which is complained o
leading label of "management rights" i
Buffalo Forge, it would still be for the
whether striking over a non-arbitrabl
management rights. All questions of
construction of the contract are for th
court in *Buffalo Forge* expressly reje
that a pre-arbitration injunction may
one of the parties claims that some arbi
the contract is at issue. (*Buffalo For*
at 408, n. 10).

The only aspect of the present case
fours with *Buffalo Forge* is that the
here does not involve a sympathy st
Circuit correctly declined to limit *Buf*
situation. In this it was on solid gro
factor in *Buffalo Forge*, as here, was t
dispute was not one which the union
bound to arbitrate. It would be absur
under the broadest arbitration claus
arbitrable disputes are sympathy strike

The criteria employed by this Court i
determine non-arbitrability of the u

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* An example of a non-arbitrable dispu
volve a sympathy strike arose in *Armco S*
Mineworkers of America, 505 F.2d 1129 (
denied 423 U.S. 877 (1975). Significantly,
the very decisions mentioned in *Buffalo Forg*
fliet among circuits that certiorari was grant
Forge, supra, 428 U.S. at 404, n. 9.

apply equally to the present
not gone on strike by reason
bers have with the employer.
but over a dispute with the
not *over* any dispute betwee
that was even remotely subj
contract." 428 U.S. at 407.
issue underlying it was sub
cedures provided by the con
and respondents" 428 U.S. 4
neither the purpose nor affe
obligation to arbitrate or of d
bargain." 428 U.S. 408, 409.

That the instant petition s
already decided by this Cour
set forth at page 4 of the pe
question posed in the *Buffal*
in that case. 428 U.S. at
answered in the negative. 4

No amount of attempted di
tion can hide the fact that wh
what the district court did by
own finding that the no-strike
to adopt the position of the di
position was expressly rejec
Court. 428 U.S. at 412. The
in reversing and vacating the

CONCLUS

For all of the reasons state denied.

Respectfully s

THOMAS
One Sta
New Yo
(212) 42
Attorney
Interna
Associ

SIDNEY
Suit 140
234 Mo
Norfolk,
(804) 62
Attorney
Local
Local
for th

Of Counsel

ERNEST L. MATHEWS, JR.
CHARLES GOLDBURG

Memorandu

UNITED STA
NORTHERN

JOHN W.

ATLANTIC COAST DISTRI
its Officers

APPEARANCES:

MCHUGH HECKMAN SM
& LEONARD, ESQ.
Attorneys for Petitione
80 Pine Street
New York, New York

DOMINICK TOCCI, ESQ.
Attorney for Local 129
112 State Street
Albany, New York 122

THOMAS W. GLEASON, E
Attorneys for Atlantic
District ILA
One State Street Plaz
New York, New York

NEAL P. MCCURN, D.J

MEMORANDU

This is a petition fo
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Union notified

McGrath's petition requests the court to compel arbitration and to enjoin and restrain the union in refusing to service the AENEAS as any other vessel carrying cargo to and from the Soviet Union.

A

Jurisdiction on this Court is conferred by Title 29 U.S.C. § 185 and Title 28 U.S.C. § 1331. The motion to compel arbitration is made pursuant to the Federal Arbitration Act Title 9 U.S.C. paragraph 4.

It is McGrath's contention that the refusal of the Union to work the AENEAS is covered by Section 11 of the Agreement as a "dispute or controversy" which has arisen "as to interpretation or application of . . . the provisions of this agreemnt" which "shall be referred to an arbitration committee for adjustment or decision". McGrath further contends that the last sentence of paragraph 11 which provides that "pending such adjudication or decision the men shall continue to work" is in the nature of a no-strike clause and based thereon seeks injunctive relief pending arbitration. McGrath also contends that the language set forth in the body of the agreement (Pg. 1) as to the obligations of the Union representative that "he shall handle any dispute between the parties and resolve such disputes on the pier level, he shall present them for arbitration through the arbitration and grievance machinery, and see that there is no stoppage of work" is further basis for the relief sought herein.

McGrath concedes that the Union's decision to refuse to load grain bound for Russia, as a means of expressing its displeasure with the Soviet aggression in Afghanistan, is not in the nature of a dispute with management over the terms and conditions of the agreement, but contends that the Union's manner of implementation of the decision, i.e.,

the stoppage of work in order to carry out that decision, does involve a dispute covered by the agreement. McGrath says that the right of management to compel the Union to work as against the right of the Union to refuse work is a dispute and as such is subject to arbitration.

The Union concedes that it is bound under the terms of the agreemnt to arbitrate a dispute between McGrath and itself as to the terms or conditions of the contract, but contends that there is no dispute with McGrath herein but rather with the Soviets and that that dispute is not arbitrable. It asserts that what we have here are two disputes—the first, and the basis for its refusal to work, is its disagreement with the Russian aggression; the second, its disagreemnt with McGrath over its right to so refuse.

B

It has, of course, been affirmativly established that the arbitration of labor disputes is highly favored. In *United States Steel Workers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), the Supreme Court articulated the desirability of the arbitration of differences between labor and management:

> The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of provision for arbitration of grievances in the collective bargaining agreement. . . . Here arbitration is the substitute for industrial strife . . . arbitration of labor disputes under the collective bargaining agreements is part and parcel of the collective bargaining process itself . . . 363 U.S. at 578 (citations omitted).

The Court went on to discuss the processes afforde the Labor Law when it stated:

> The Congress, however, has by Section 301 of Labor Management Relations Act, assigned the Co the duty of determining whether the reluctant p has breached his promise to arbitrate. For arb tion is a matter of contract and a party canno required to submit to an arbitration any dispute w he has not agreed so to submit. Yet, to be consis with congressional policy in favor of settlemen disputes by the parties throu;h the machinery of a tration, the judicial inquiry under Section 301 r be strictly confined to the question whether the luctant party did agree to arbitrate the grievanc did agree to give the arbitrator power to make award he made. An order to arbitrate the partic grievance should not be denied unless it may be with positive assurance that the arbitration claus not susceptible of interpretation that covers the serted dispute. Doubts should be resolved in f of coverage." 363 U.S. at 582-583.

In *United Steel Workers* the Court further observed the question of arbitrability is for the courts to decid

> The question here, therefore, is whether there is a pute covered by the agreement which should be submi to arbitration pursuant to the terms of the agreem When a dispute is not one which the parties agree to a trate, there can be no requirement to arbitrate and

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[1] "Where the assertion by the claimant is that the partie cluded from court determination not merely the decision o merits of the grievance but also the question of its arbitrab vesting power to make both decisions in the arbitrator, the c ant must bear the burden of a clear demonstration of purpose." 363 U.S. 583, Footnote 7.

injunction. *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 380, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974).[2]

C

There are two disputes here, one with the Russians- the basis of the Union's refusal to work; the other wit management over the Union's right to refuse to work. is clear that the parties to this labor-management contra did not agree to arbitrate the former. Did they agree arbitrate the latter?

The Union concedes that if there was a broad no-strik clause in the contract, then its right to strike to enforc its position on the first (Russian) dispute would be subje to arbitration, but in the absence of such a clause, th Union claims it is not subject to arbitration.

It claims these distinctions were set forth and recognize by the Supreme Court of the United States in *Buffal Forge Co.* v. *United Steel Workers of America, AFL-CIO* 428 U.S. 397, 96 S.Ct. 3141 (1976), wherein the Cou observed:

> ". . . the strike was not *over* any dispute betwee the Union and the employer that was even remotel subject to the arbitration provisions of the contrac The strike at issue was a sympathy strike in suppo of sister unions negotiating with the employer; neith its causes nor the issue underlying it was subject t the settlement procedures provided by the contra between the employer and the respondents. The strik had neither the purpose nor the effect of denying evading an obligation to arbitrate or of depriving th employer of his bargain. Thus had the contract n

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[2] "No obligation to arbitrate a labor dispute arises solely b operation of law. The law requires a party to submit his grievan to arbitration only if he has contracted to do so." 414 U.S. 36 373.

> contained a no-strike clause or had the clause excluded sympathy strikes, there would hav possible basis for implying from the existe arbitration clause a promise not to strike have been violated by the sympathy stri case." (citation omitted) 428 U.S. at 407, 4

It should be noted that in *Buffalo Forge* the contained a "no-strike clause" and the Supr held that the issue of whether or not that clau a sympathy strike was arbitrable, that is, whet the broad no-strike clause covered any and all s work whether related to disputes with managem Insofar as the underlying dispute, the Supr adopted the reasoning and decision of the Secc and found that it was not arbitrable. The Secc had held "the strike at issue in the instant case a grievance with *Buffalo Forge*, but instead i manifestation of the striking workers deferenc employees' picket lines." (517 F.2d 1207 at 12 1975), and further observed:

> a strike not seeking to pressure the e yield on a disputed issue is not an attempt vent arbitration machinery established by bargaining agreement. Accordingly, it d lence to the federal pro-arbitration policy federal courts to refrain from enjoining s *Buffalo Forge Co., supra.*, 428 U.S. at p. tions omitted).

In this the Court of Appeals affirmed the Dis which had refused to issue an injunction precis the underlying dispute was not arbitrable. *Bu Co.* v. *United States Steel Workers of America*, 386 F.Supp. 405 (W.D.N.Y. 1974).

D

McGrath alleges, in connection with the IL wide refusal to load grain ships for Russia a against the Soviet invasion of Afghanistan, t disputes in the Ports of Houston, New Orlean ville, Norfolk and Philadelphia have been submit tration and that arbitrators in those cases h mously found against the Union, and that oth Courts have uniformly issued restraining orde ing work stoppage. Two District Court cases brought to this Court's attention, i.e., *Jackso Terminals, Inc.* v. *ILA* (M.D. Fla., Jackson Docket No. 80-81-CV-J-B); and *New Orleans Association* v. *General Longshoreworkers,* (Docket No. 80-0335). However, it appears that Management Agreement in both those cases separate and distinct no-strike clauses. In the J case the no-strike clause provided:

> During the term of this agreement, the agrees that there shall be no lockout of th of the Union, and Union agrees that there be any strike of any kind whatsoever, wa pension of work, curtailment, or limitation tion, slow down, or any other interruption o total or partial, of the employers' operati cause whatsoever. . . . Paragraph 15(b)

In the *New Orleans* case the no-strike clause

> (a) No strikes, no lockouts—there will be work stoppages or shall there be any lockou

The Court in *New Orleans* granted a prelimin tion against the Longshoremen's Locals prev work stoppage in connection with the loading o

of grain destined for the Soviet Uni
her opinion states:

> The Unions contend that the nc
> the collective bargaining agree
> work stoppage of a political na
> dispute exists between the empl
> the arbitrators exceeded their a
> the defendant unions to load carg
> This Court decides otherwise. T
> ing agreements in this case cont
> equivocal no-strike and no-wo
> There are no exceptions to this p

The difference between the collecti
ments in the *New Orleans* and *Jacks*
one now before this Court is obviou
agreement contained an independent
not to strike. The promise was not
arbitration. In *Jacksonville* it was
agreement"; in *New Orleans,* it wa
will be no strikes"; in *Buffalo For*
conditional "there shall be no strike

It is significant that the Union agr
case is not in the form of a sepa
promising not to interrupt or refus
and all circumstances, but is an agr
work once a matter involving interpr
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tion for adjustment or decision.

E

A Union can be compelled to arbi
from striking only because it has ag
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Boys Markets v. *Retail Clerks Union*, 39
1583, 26 L.Ed. 2d 199 (1970). The reli
of specific performance of a promise
than to strike. However, where, as i
there has been no such promise, the C
these remedies.

Here, the only promise not to strike
arbitration is pending. If there is n
trated, there is no obligation not to str
bargaining agreement in the case at ba
any broad, independent no-strike prov
Union has committed itself generally n
the life of the agreement. Rather, the
only that there will be no work stop
disputes are being arbitrated".

As in *Buffalo Forge*, the grievance
Afghanistan invasion—is clearly not wi
clause. To hold that the employer itse
claiming that the no-strike clause was be
an arbitratable dispute, thus, triggering
would be circular reasoning. As the S
in *Buffalo Forge* "if a strike not seek
grievance is enjoinable, then the policy o
is virtually obliterated." 517 F.2d at
Fifth Circuit observed in *Amstar Cor*
Meat Cutters and Butcher Workmen
AFL-CIO, 468 F.2d 1372 (5th Cir. 19
difficult to conceive of any strike whic
joined." 468 F.2d at 1373.

The great difference between the cas
litigation involving similar sympathy
other litigation involving the ILA's refu
bound for the Soviet Union, lies in the c
agreements themselves. Unlike the situ
there is here no independent promise

strike. There is only a pro
arbitration is pending, which
arbitrable issue.

The contract in this case
tional promise not to strike f
The Union promises only to
tion is pending. There is h
to which arbitration applies.
tration is denied as is the re

IT IS SO ORDERED.

Dated: March 6, 1980
Syracuse, New York